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IN THE

Supreme Court of the United States

October Term, 1961

No. 390

NEWBOLD MORRIS, as Commissioner of Parks of the City of New York,

Petitioner,

against

GEORGE L. ROCKWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

Newbold Morris, as Commissioner of Parks of the City of New York, prays that a writ of certiorari issue to review the Final Order of the Court of Appeals of the State of New York entered on June 9, 1961.

Citations of Opinions Below

The opinion of the Supreme Court of the State of New York is reported in 26 Misc 2d 229, 208 N. Y. S. 2d 154. It is printed in the record (247-251).* The majority and dissenting opinions of the Appellate Division of the State of New York, First Judicial Department, are reported in 12 AD 2d 272, 211 N. Y. S. 2d 25. They are printed in the record (274-399). The decision of the Court of Appeals of the State of New York affirmed without opinion the order of the Appellate Division and is not as yet reported. A motion to amend the remittitur was granted by the Court of Appeals and is not as yet reported. Copies of the orders of the Court of Appeals affirming the order of the Appellate Division and granting the motion to amend the remittitur are annexed hereto and marked Appendix A and Appendix B, respectively.

Petitioner is filing herewith nine copies of the record as printed for the use of the Court below.

Jurisdiction

The final order of affirmance of the Court of Appeals of the State of New York which is sought to be reviewed herein was made and entered on June 9, 1961.

A motion to amend the remittitur was made in the Court of Appeals of the State of New York and was granted, and an order to that effect was entered on July 7, 1961. The order directed that the remittitur be amended to read as follows:

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* Numerals in parenthesis refer to folios of the printed record on appeal to the Court of Appeals of the State of New York unless otherwise indicated.

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Respondent contended that the refusal of the Commissioner of Parks of the City of New York to issue a permit to respondent to speak in a park under the jurisdiction of the Commissioner of Parks constituted a violation of the respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that there was such a violation."

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and 28 U. S. C., §§1257 and 2101(c) on the ground that the Court of Appeals of the State of New York has decided this case in a way probably not in accord with the applicable decisions of this Court.

Question Presented for Review

Whether or not the refusal of the Commissioner of Parks of the City of New York to issue a permit to respondent to speak in a park under the jurisdiction of the Commissioner of Parks constituted a violation of the respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States.

Provisions of the Constitution of the United States in Point

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York City Charter Provisions Involved

Chapter 21 of the New York City Charter dealing with the Department of Parks provides, so far as here relevant, as follows:

"§531. **Department; commissioner.**—a. There shall be a department of parks the head of which shall be the commissioner of parks who shall be appointed by the mayor.

* * *

§532. Authority, duties and powers of the commissioner.—The commissioner shall have the power and it shall be his duty:

1. To have charge of the management and be responsible for the care of all parks, parkways, squares and public places, and of the sidewalks immediately adjoining the same, except as otherwise provided by law, of all playgrounds, playground fixtures and other recreational property, except those within the jurisdiction of the department of education, and of such other streets or avenues as are by law placed under his jurisdiction; but such jurisdiction shall not extend to or include the buildings which are now or hereafter may be erected in parks, squares or public places for governmental purposes other than those of the department of parks.

* * *

§534. Rules and regulations.—a. The commissioner shall have power to establish and enforce rules and regulations for the government and protection of public parks and of all property under the charge or control of the commissioner, which rules and regulations so far as practicable shall be uniform in all boroughs and shall have the force and effect of law.

b. Any violation of the rules or regulations of the commissioner shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or by both."

Park Department Regulations Involved

The Rules of the New York City Department of Parks, §21-a, provide as follows:

"Section 21-a Meetings, etc.

1. No person shall erect any structure, stand, or platform, hold any meeting, perform any ceremony, make a speech, address or oration; exhibit or distribute any sign, placard, notice, declaration or appeal of any kind or description; in any park or upon any park-street except by permit.

2. Upon application such permit will be issued unless—(a) The use for which the permit is sought is of a private or commercial nature, or (b) The location selected is not suitable because the area is specially landscaped and planted with botanical, flower, shrub or tree exhibits, or (c) The location selected is not suitable because it is one of the specialized park use areas such as zoos, skating rinks, swimming pools, recreational, etc. or (d) The date and time requested has previously been allocated by permit, or would obstruct and interfere substantially with park use and enjoyment by the public.

3. Whenever a permit is denied by reason of (b), (c) or (d) above, alternative suitable locations and dates shall be offered to the applicant."

Manner in Which Federal Question Sought to be Reviewed Was First Raised

The federal question now sought to be reviewed was raised in the pleadings in the court of first instance, Special Term of the Supreme Court of the State of New York. The respondent's petition therein asserted that the denial of a permit to speak in the park under the jurisdiction of the Commissioner of Parks of the City of New York constituted a violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution (30-33). That contention was rejected in the court of first instance (13-17, 247-251).

The respondent appealed to the Appellate Division, First Department, and raised the same federal question in his brief in that Court. The Appellate Division, by a divided court, reversed the order of Special Term, Supreme Court, and sustained the respondent's contention that his constitutional rights had been violated by the refusal to grant him a permit to speak in the parks, and remitted the matter to the petitioner to proceed in accordance with the majority opinion of the Court (265-270, 274-330).

The petitioner appealed to the Court of Appeals of the State of New York. The same federal question was raised in the petitioner's brief in the Court of Appeals. The Court of Appeals unanimously affirmed without opinion the order of the Appellate Division. Thereafter the Court of Appeals granted a motion to amend the remittitur so as to include therein a recital that there was presented and necessarily passed upon the federal question raised by the parties, *supra*, p. 3.

The Facts

(1)

The petition served on August 11, 1960, alleges that the petitioner* is a citizen of the United States and of Virginia and is president of the American Nazi Party, an unincorporated association (23-24).

On May 17, 1960, petitioner, on behalf of the American Nazi Party, applied to the Department of Parks for a permit to speak in Union Square on July 4, 1960, from 3 p.m. to 5 p.m. on that day (27). A copy of the application is annexed to the petition (34-41).

On June 22, 1960, the Park Commissioner wrote denying the application for a permit. The letter of denial did not state the reasons therefor (29, 43-45). However, the petition alleges, on June 22, 1960, the Mayor announced that the permit was being denied on the ground that the petitioner's expression of his views in a speech would lead to public disorder (29). (The full text of the Mayor's statement is attached to the answer as Respondent's Exhibit 1 [fols. 61-63] and is quoted in part *infra*, pp. 9-10).

The petition concludes with assertions that the denial of a permit to speak to the petitioner constituted a violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and the Constitution of the State of New York and constituted an invalid prior restraint (30-33).

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* In the recital of facts and the proceedings below the parties are referred to by their designations in the Courts below, i.e., the respondent herein as petitioner and the petitioner herein as respondent.

(2)

The answer denies the conclusory allegations of the petition and sets forth several affirmative defenses (46-59).

The first affirmative defense recites that the American Nazi Party is a subversive organization advocating the overthrow of constitutional government in the United States by force and violence in violation of the Penal Law of the State of New York (50).

The second defense alleges the petitioner's meeting was designed to further the aims of the American Nazi Party, one aim of which is the perpetration of racial genocide upon persons of Jewish ancestry. Public property may not be used to urge such a practice, which is contrary to law (50-51).

The third defense alleges that the statement at a public meeting of the aims of the American Nazi Party would have the effect of inciting ordinary prudent persons to acts of violence and disorder. While the Police Department could quell such riots and disorder, it could not prevent their occurrence in the first instance (52-53).

(3)

Respondent's Exhibit F, annexed to the answer, is a statement by the Mayor as to the reasons for the denial of a permit to petitioner to speak. It reads in part as follows (61-63):

> "A man named George Rockwell of Washington, D.C. has applied for a permit to speak in Union Square on July 4th. Information supplied to me by qualified sources shows clearly that Mr. Rockwell's intent is to incite a riot by preaching, in a city where the people of all races live peacefully together, a philosophy of race hatred, and extermination, by violence. Left to

their own devices, the people of this city will stone Rockwell out of town. There is not a decent responsible citizen in the city who would follow him in his preachings. There are millions who have friends and relatives who died because of this type of race hatred, either as unarmed victims, or as soldiers fighting for freedom.

"We have in this city the largest, and I believe the best, police force of any municipality. It can QUELL any riot. But no police force in the world can stop a riot from starting. In this case, every fact we have shows that Rockwell's presence as a preacher of race hatred will cause a riot the police will have to quell."

Respondent's Exhibits C-H inclusive, annexed to the answer, are statements issued on behalf of the petitioner or the American Nazi Party (124-228). These exhibits and the recital of events which took place when the petitioner spoke in Washington, D. C., and when he appeared in court in connection with the present application, as set forth in the affidavit of the Park Commissioner, fully justify the Mayor's conclusion that Rockwell's presence as a preacher of race hatred will cause a riot.

From the numerous examples in the exhibits, we need refer to only two of the more lurid instances of race hatred and advocacy of genocide contained therein, which are among the half-dozen instances recited in the affidavit of the Commissioner of Parks submitted in opposition to petitioner's application (64-102). Thus the Commissioner in summarizing the contents of Respondent's Exhibit F, stated (82-86):

"In a letter, copy of which is attached hereto, marked Respondent's Exhibit 'F', obviously intended for his fanatical cohorts addressed as 'Fellow White American', *the petitioner advocates as the only cure for 'Jewitis,' 'old Doctor Adolf's Gas-Cure'* (1st page,

5th par.); charges the Jewish people with 'killing our White Race with their sneaking "brotherhood" propaganda and their aggressive manipulation of the ignorant blacks into a mass assault on the White Man', (1st page, par. 7); maintains that the Jewish people 'have Stolen and Corrupted Your Own Children with their Jew T.V., their Jew-ridden schools, and the filthy Jew literature your teen-agers can buy in any drugstore' (2nd page, 2nd par.); charges that 'the Jews have ridden roughshod over one defense effort after another' (2nd page, 3rd par.) and then continues (2nd page, 4th and 5th pars.):

> 'But whenever somebody, realizing this, has timidly suggested trying Old Doc Hitler and his Gas-cure, the cry has always gone up, "Yes, but that medicine is so terrible tasting, and has been made to smell so bad that nobody will even look at it.!"
>
> 'Well, one year ago, we decided we had heard enough of that "the medicine-is-too awful!" THE DISEASE IS WORSE! The disease is about to prove FATAL! And if our Race and our previous American Republic are DYING, with not a soul doing anything but prescribing the same old pretty-colored aspirins, - then the HELL with the taste and smell of the medicine, and the HELL with the squawks of the shortsighted victims who think they would rather perish th[illegible] take the medicine! The medicine MIGHT not save us, but the disease SURELY WILL KILL US, unless we find a new remedy. *We resolved to call in Old Doc Adolf and try out his patent gas-chamber to relieve the acute inflamation of Jews which is killing us, even if we have to hold the noses of the unwilling patients.*' (Italics mine.)"

Continuing the description of Respondent's Exhibit F, the Commissioner noted (86):

> "In paragraph 4 on page 3 there is again urged the extermination of 'the swarms of Jewish traitors in our gas chambers'; the use of 'radical fighting tactics' is advocated, and finally in the last paragraph the petitioner seeks financial help for aid in the '*Fight For The Power To Kill The Jew Traitors.*' (Italics mine.)"

And as to Respondent's Exhibit G, the Commissioner points out (86-87):

> "The petitioner seeks to justify his advocacy of the gas chamber for Jews in his tract entitled 'Trooper's Manual of the Facts, Doctrines and the Ideas, of the American Nazi Party,' a copy of which is attached hereto and marked Respondent's Exhibit 'G'. In the first paragraph of page 1, it is stated:
>
> > 'We openly plan to put hundreds of thousands of Jews who are committing the capital offense of TREASON in the Gas Chambers, exactly as the Rosenbergs were executed, not because they were Jews,—but because they were traitors! This is all that Hitler did, as the suppressed Gestapo records show.'"

The Commissioner's affidavit further pointed out that the petitioner's advocacy of gas chambers for Jews is well known as evidenced by a news clipping of the New York Journal-American of June 17, 1960, which contains a report of a telephone conversation with the petitioner (Respondent's Exhibit I, 229-239).

The Commissioner's affidavit also refers to various instances of the proclivity of the petitioner to incite violence. The circumstances as to this were confirmed by the Corporation Counsel from official police records submitted in connection with petitioner's arrests (92-93).

Thus on July 3, 1960, petitioner conducted a mass meeting in a park in Washington, D. C., before a crowd of approximately 350 persons. The meeting began at 2 p.m The petitioner made derogatory remarks about the Jews such as "All right, Jews, go ahead and scream" and "Scream, you dirty Jews." Shouting between the speaker and the audience continued for about an hour and fifteen minutes during which time three arrests were made by the police for disorderly conduct based on fighting. At approximately 3:15 p.m. the crowd surged into the enclosure guarded by petitioner's Storm Troopers and fist fighting became general. The intervention of ten park policemen, including two mounted policemen, was insufficient to restore order and additional park policemen were called in by radio. The petitioner and eleven of his Troopers were arrested and charged with disorderly conduct (93-95).

A similar incident occurred at a rally conducted by petitioner in another park in Washington, D. C., on July 24, 1960. About ten park policemen and fifteen or twenty plainclothes officers of the Metropolitan Police Department were present. The petitioner's speech met with considerable heckling from the audience. After the meeting had gone on for about forty minutes, the petitioner ordered his Troopers to go into the audience and confront the hecklers. Several fights then started. At this point, the petitioner was ordered to stop his speech and he and his Troopers were arrested for acting in such a manner as to provoke disorder, fights, and a general breach of the peace (96-98).

The charges against the petitioner arising out of the two Washington incidents were undetermined at the time of the Commissioner's affidavit (99). (We have since been advised that on August 30, 1960, petitioner was convicted in the Municipal Court of the District of Columbia on two counts of disorderly conduct arising out of these incidents and was sentenced to $100 or 30 days on each count, to run concurrently. He was released on a $500 bond pending appeal. On July 11, 1961, the conviction was

affirmed by the Municipal Court of Appeals for the District of Columbia. A further appeal is pending in the Court of Appeals for the District of Columbia.)

The events that followed the appearance of the petitioner in court in connection with the present proceeding are thus described in the Commissioner's affidavit (89-92):

> "Evidence that violence is inevitable upon the public appearance of the petitioner with the concomitant opportunity by him to spew his venom is found in the incident of June 22, 1960 in the rotunda of the County Courthouse in New York County on the occasion when there was before Special Term, Part I, of this Court an application to restrain me from issuing a permit to the petitioner. On information and belief, during a recess in the proceedings, the petitioner was interviewed by a battery of television, radio and newspapermen. In response to one inquiry petitioner is alleged to have stated that he 'honestly believe that 80% of the Jews in New York City are communists and should be exterminated by gas chambers as Hitler did in Germany.' This remark was sufficient to set off bedlam, prompting shoving and a surge of the crowd toward petitioner with shouts of 'Kill him' 'Get rid of him,' and 'Throw him out.' Petitioner was immediately surrounded by a horde of court attendants who escorted him to safety to another part of the building. Police reserves were summoned from headquarters and the petitioner was removed from the courthouse under police protection. Attached hereto and marked Respondent's Exhibit 'J' is a newspaper item taken from the Herald Tribune of June 23, 1960 describing the incident. Reference is herein made to a tape recording of the incident in the rotunda of the Courthouse which, with the Court's permission, will be played back upon the hearing of this application."

Mayor Robert F. Wagner also submitted an affidavit in opposition to the petitioner's motion (103-111). The affidavit stated in substance that the Park Commissioner's denial of the petitioner's application for a public meeting had followed a determination by the Mayor that public safety and the preservation of law and order required such rejection.

The Mayor's affidavit pointed out that the overwhelming evidence indicated that petitioner's course of inflammatory conduct would inevitably lead to the use of language calculated to incite violence (110). And, as stated by the Mayor (110):

> "On the basis of this information it was then concluded that a public speech by petitioner on the subjects of Nazism, racial prejudice, intolerance and genocide constitutes a clear and present danger of a serious substantive evil rising far above mere public inconvenience, annoyance or unrest."

There circumstances impelled the Mayor to exercise the powers vested in him by the Charter in order to guard against riots, disorder and acts of violence (111).

The Decisions Below

(1)

Mr. Justice Epstein sitting at Special Term, Supreme Court, New York County denied the petition with a brief opinion (247-251). The Court stated that there was no obligation to loose self-confessed advocates of violence upon a community. The constitutional guarantees of free speech were held not to encompass an invitation to public disorder and violence.

(2)

(a)

The majority opinion in the Appellate Division held that the petitioner was entitled to a permit to speak in Union Square Park and that the Commissioner's refusal to grant such a permit was an unconstitutional exercise of power (274-330). The opinion referred to numerous cases dealing with the right to speak and stated that the instant case was close to *Kunz* v. *New York*, 340 U. S. 290 (1951), where the Supreme Court had held unconstitutional an ordinance which required the issuance of a permit in order to hold a meeting for religious purposes in any street. The conclusion drawn from *Kunz* and other cases cited in the opinion was that the petitioner's right to speak in the park could not be abrogated without violating his constitutional rights and was subject only to the rules of the Park Department with reference to the time and place of such speech. The opinion pointed out that such rules required that the Park Commissioner designate an alternative time or place for speaking in the park if the one requested by the petitioner was not suitable and that the Commissioner had failed to designate any such alternative with respect to petitioner's application.

The majority stated that, in view of the public importance of the question presented, the Court should not hold the proceeding to be moot. Accordingly, the order of Special Term should be reversed and the matter emanded to the Commissioner to allow petitioner to file a new application for a permit and for the Commissioner to proceed thereon in accordance with the opinion.

(b)

Mr. Justice EAGER dissented from the majority. The dissenting opinion (346-399) discussed at some length the facts relating to the reasons for the refusal of a permit to petitioner, particularly as set forth in the Mayor's affidavit reciting the petitioner's persistent inflammatory conduct and his failure to disclaim his intent to pursue the same course. The opinion held that the refusal to issue a permit under the circumstances herein was justified, and referred *inter alia* to *Feiner* v. *People of State of New York*, 340 U. S. 315 (1951); *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957); and *Times Film Corp.* v. *Chicago*, 365 U. S. 43 (1961), rehearing denied *id.* 856.

(c)

The Court of Appeals unanimously affirmed without opinion the order of the Appellate Division.

Argument Relied on for Allowance of Writ

The refusal of the Commissioner of Parks to issue a permit to respondent to speak in a park did not constitute a violation of respondent's constitutional rights. The respondent's utterances and course of conduct created a clear and present danger justifying the denial of a permit.

(1)

The instant application presents for review the question as to what circumstances warrant a refusal to permit a person to speak in a public place despite the constitutional guarantees of free speech. We submit that the clear and present danger of riot and disorder involved in any speech by the respondent justified the refusal to grant him a permit.

The respondent's contention has been that a permit could not be refused to him because of his past utterances or conduct. That view was adopted by the majority of the Appellate Division and by the Court of Appeals.

In examining the validity of the respective contentions of the parties, we turn to cases in which this Court has expressed its views as to the limitations upon freedom of speech. While each of these cases presents a factual pattern differing from that in the instant case, the opinions therein clearly indicate that the right of free speech is not an absolute one and that there are circumstances in which the denial of the right to speak does not constitute an infringment of a constitutional right.

Konigsberg v. *State Bar of California*, 366 U. S. 36 (1961), is among the most recent decisions of this Court dealing with the freedoms guaranteed by the First and Fourteenth Amendments. The majority expressed its view as follows, per HARLAN, J. (pp. 49-51):

> "At the outset we reject the view that freedom of speech and association (*N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 460), as protected by the First and Fourteenth Amendments are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, *e.g.*, *Schenck* v. *United States*, 249 U. S. 47; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Den-*

nis v. *United States*, 341 U. S. 494; *Beauharnais* v. *Illinois*, 343 U. S. 250; *Yates* v. *United States*, 354 U. S. 298; *Roth* v. *United States*, 354 U. S. 476. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. See, *e.g.*, *Schneider* v. *State*, 308 U. S. 147, 161; *Cox* v. *New Hampshire*, 312 U. S. 569; *Prince* v. *Massachusetts*, 321 U. S. 158; *Kovacs* v. *Cooper*, 336 U. S. 77; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Breard* v. *Alexandria*, 341 U. S. 622."

Times Film Corp. v. *Chicago*, 365 U. S. 43 (1961), rehearing denied *id.* 856, is another recent decision dealing with the free speech and free press guarantees of the First and Fourteenth Amendments. There the petitioner challenged the constitutionality of a Chicago ordinance which required the submission of all motion pictures for examination prior to their public exhibition. In rejecting the petitioner's contention that the ordinance was invalid as a previous restraint on freedom of speech, the majority opinion stated, per CLARK, J. (365 U. S. at pp. 47-48):

"It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near* v. *Minnesota*, 283 U. S. 697, 715-716 (1931), Chief Justice Hughes in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint 'is stated too broadly, if every such

> restraint is deemed to be prohibited * * * [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' These included, the Chief Justice found, utterances creating 'a hindrance' to the Government's war effort, and 'actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' In addition, the Court said that 'the primary requirements of decency may be enforced against obscene publications' and the 'security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.' * * * Thereafter, as we have mentioned, in *Joseph Burstyn, Inc.* v. *Wilson, supra*, [343 U. S. 495 (1952)] we found motion pictures to be within the guarantees of the First and Fourteenth Amendments, but we added that this was 'not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.' "

In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957), this Court upheld the constitutionality of a New York statute (Penal Law, § 22-a) which *inter alia* permitted an injunction against the sale or distribution of obscene books or writings. In rejecting the contention that the statute constituted an illegal prior restraint and violated the constitutional rights of the defendants, Mr. Justice FRANKFURTER, writing the majority opinion, stated (354 U. S. at pp. 441-442):

> "The judicial angle of vision in testing the validity of a statute like §22-a is the operation and effect of the statute in substance.' *Id.* [*Near* v. *Minnesota*, 283 U. S. 697], at 713. The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic

test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539."

If the pragmatic test referred to in *Kingsley* is applied to the facts here, it is not difficult to visualize the result of respondent's speaking in a public park. As already pointed out, *supra*, p. 13, respondent's speeches in Washington, D. C., caused riots and disorder on two separate occasions as did his appearance in the New York Supreme Court when he was interviewed by reporters. We do not believe that the Commissioner and the Mayor were required to shut their eyes to these circumstances and issue a permit to speak in a public park regardless of the dangers which would be created. As th Mayor pointed out, the police force could quell a riot but it could not stop it from starting (61-63). This was borne out by the Washington experience where riots started despite the presence of large numbers of policemen on the two occasions when petitioner spoke (92-98).

The Court at Special Term commented that no cited case presented a parallel to the instant one (250).

This observation was correct and serves to illustrate the extremely provocative nature of respondent's statements. We have summarized some of respondent's utterances, *supra*, pp. 10-12, and need not dwell further upon them. We direct attention to them, however, as clear

proof of the dangers caused by respondent's public speeches. It would be beyond human experience to expect that any group of people would long fail to react with violence to suggestions that they or their fellow citizens be exterminated in gas chambers.

In *Schenck* v. *United States*, 249 U. S. 47 (1919), this Court affirmed the conviction of the defendant under the Espionage Act (40 Stat. 217) on the ground that he had conspired to circulate documents among men called for military service which were calculated to cause insubordination and obstruction. In rejecting the contention that prohibiting the circularization of the document in question constituted an invalid prior restraint, Mr. Justice Holmes, speaking for a unanimous Court, said (249 U. S. at pp. 51-52):

> "But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson* v. *Colorado*, 205 U. S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439. The question

> in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (Italics ours.)

Mr. Justice HOLMES' statement that constitutional guarantees do not "protect a man from an injunction against uttering words that may have all the effect of force" is particularly apt here. So far as the respondent's past words having the effect of force, it is difficult to visualize a clearer case than the instant one. As Mayor Wagner pointed out, the respondent has never disclaimed his intention to make similar pronouncements and in fact has left no doubt that he intends to do so if given the opportunity (111).

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), and *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), this Court indicated that under certain conditions the prevention of speech did not constitute a violation of constitutional rights. In *Chaplinsky*, Mr. Justice MURPHY stated (315 U. S. at pp. 571-572):

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such

> slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310." (Italics ours.)

To the same effect is the statement by Mr. Justice JACKSON in *Barnette* (319 U. S. at p. 633):

> "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."

Gitlow v. *New York*, 268 U. S. 652 (1925) contains a comment which is pertinent here. There this Court, in sustaining a conviction for criminal anarchy under the New York statute (L. 1909, ch. 88), said (at p. 669):

> "That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. *The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.* It cannot be said

> that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. *It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.*" (Italics ours.)

Even when the Court spoke out most strongly against previous restraints, it was careful to recognize that "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." (*Near* v. *Minnesota*, 283 U. S. 697, 716 [1931].)

In *Gibonev* v. *Empire Storage Co.*, 336 U. S. 490 (1949), Mr. Justice BLACK, speaking for a unanimous court, held at page 498:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding."

That the doctrines advocated by the respondent are in violation of the criminal law of New York State cannot be doubted. The respondent urges the killing of "hundreds of thousands of Jews" by use of the gas chamber (87), and we need not elaborate further upon his fulminations which have already been described, *supra*, pp. 9-14.

(2)

Respondent relies heavily upon *Kunz* v. *New York*, 340 U. S. 290 (1951). However, that case is clearly distinguishable from the instant one.

Kunz was a criminal prosecution in which the defendant was charged with violating a provision of the Administrative Code of the City of New York (§435-7.0), which required a permit from the Police Commissioner in order to hold a meeting for religious purposes in any street. This Court struck down the section as an unwarranted interference with the expression of religious views.

In the instant case there can be no question as to the validity of § 21-a of the Rules of the Park Department which require a permit in order to hold a public meeting in the parks. The validity of the then § 21, the predecessor of the present §21-a of the Park Department Rules, which was similar in its requirement as to a permit for the holding of a public meeting in the parks, was upheld in *People* v. *Nahman*, 298 N. Y. 95, 81 N. E. 2d 36 (1948) and *People* v. *Hass*, 299 N. Y. 190, 86 N. E. 2d 169 (1949), appeal dismissed for want of a substantial federal question, *sub nom. Hass* v. *New York*, 338 U. S. 803 (1949).

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) is similar to *Kunz* in that it was a criminal conviction for violation of a statute which required a permit in order to solicit for any religious cause. The grounds for distinguishing *Kunz* from the instant case are also applicable to *Cantwell*.

No useful purpose would be served by analyzing in detail each of the cases relied upon by respondent. We can have no quarrel with expressions to the effect that constitutional rights are fundamental and must not be curtailed. The question here is whether the respondent's claimed con-

stitutional right entitles him to an unbridled license to advocate violence and precipitate disorder. For the reasons set forth we do not believe such leeway should be allowed.

(3)

The respondent urges that no standards have been set forth to authorize the denial of a permit. As already pointed out, the question of the constitutionality of Section 21-a of the Rules of the Park Department has been settled by the decisions in *People* v. *Nahman*, *supra*, and *People* v. *Hass*, *supra*. Accordingly, the respondent cannot now successfully urge that the section is unconstitutional.

The respondent's quarrel is not with the lack of a standard in Section 21-a but rather with the Park Commissioner's refusal to issue a permit. Cf.: *Matter of Dr. Bloom, Dentist, Inc.* v. *Cruise*, 259 N. Y. 358, 182 N. E. 16 (1932), reargument denied 260 N. Y. 571, 184 N. E. 97 (1932), appeal dismissed for want of a substantial federal question, 288 U. S. 588 (1932). There the City Clerk was upheld in his refusal to issue a sign permit to petitioner on the ground that the permit was a prelude to perpetration of an illegal act by petitioner, i.e., advertising dentistry. The illegal act to be performed here is as patent as the one involved in *Bloom*, and the case tends to support the instant refusal to issue a permit to respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

August 31, 1961.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel of the City of New York,
Attorney for Petitioner.

of Counsel:
SEYMOUR B. QUEL,
SAUL MOSKOFF.

Appendix A

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of June in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR June 9, 1961

No. 139

In the Matter of

the Application of George L. Rockwell,
Respondent,

vs.

Newbold Morris, as Commissioner of
Parks of the City of New York
Appellant,

For an order &c.

BE IT REMEMBERED, That on the 11th day of April in the year of our Lord one thousand nine hundred and sixty-

one, Newbold Morris, as Commissioner of Parks of the City of New York, the appellant—in this cause, came hereunto the Court of Appeals, by Charles H. Tenney, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And George L. Rockwell, the respondent—in said cause, afterwards appeared in said Court of Appeals by Emanuel Redfield, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Seymour B. Quel, of counsel for the appellant—, and by Mr. Emanuel Redfield, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to

the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 9, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(Seal)

Appendix B

STATE OF NEW YORK.

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of July A. D. 1961.

Present,

Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 462

In the Matter of

the Application of George L. Rockwell,

Respondent,

vs.

Newbold Morris, as Commissioner of Parks of the City of New York,

Appellant,

For an order &c.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and when returned it will be amended to read, as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Respondent contended that the refusal of the Commissioner of Parks of the City of New York to issue a permit to respondent to speak in a park under the jurisdiction of the Commissioner of Parks constituted a violation of the respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that there was such a violation."

AND the Clerk of the Supreme Court, New York County, is hereby requested to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk